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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

NICHOLAS ROLOVICH,

Plaintiff,

v.

WASHINGTON STATE  
UNIVERSITY,

Defendant.

NO. 2:22-cv-00319

**PLAINTIFF'S COMBINED  
RESPONSE TO  
DEFENDANT'S CROSS-  
MOTION FOR SUMMARY  
JUDGMENT AND REPLY  
TO PLAINTIFF'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

December 3, 2024  
Without Oral Argument

PLAINTIFF'S COMBINED RESP. TO  
DEF.'S CROSS-MSJ AND REPLY IN  
SUPPORT OF PTF.'S MOTION FOR  
PARTIAL SUMMARY JUDGEMENT  
NO. 2:22-cv-00319-TOR

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## INTRODUCTION

WSU’s *Combined Response to Plaintiff’s Partial Motion for Summary Judgment and Cross-Motion for Summary Judgment* (WSU’s “Brief”) is a tour de force of post-hoc rationales for why WSU would have suffered undue hardship had it accommodated Plaintiff (“Rolovich”). At most, however, WSU’s “undisputed” evidence is highly disputed, speculative and often inconsistent with WSU’s actual practice at the time. Much of WSU’s evidence is also inappropriate under current Title VII jurisprudence, either because it was not within WSU’s knowledge at the time of the termination decision or because it relies on impermissible considerations under Title VII. The sheer scope of the factual record that WSU cites—and the ambiguity of that record—underscores the fact-intensive nature of Rolovich’s claims and WSU’s defenses. Additionally, WSU omits the growing number of COVID-19 vaccine cases in the Ninth Circuit and elsewhere that are headed to juries or have already gone to juries. Rolovich’s case should as well.

### **A. Triable Issues of Fact Preclude WSU’s Request for Summary Judgment on Rolovich’s Title VII Claim**

- 1. Rolovich has satisfied the elements of his prima facie case. Alternatively, as WSU admits, sincerity is a question of fact for the jury which necessarily precludes granting summary judgment.**

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1 Rolovich has asked the Court to find that he has established a prima facie  
2 case under Title VII.<sup>1</sup> ECF No. 88 at 14. WSU argues the Court should deny  
3 Rolovich's motion because it claims Rolovich did not sincerely hold the religious  
4 beliefs described in his exemption letter. ECF No. 93 at 18-21. If the Court  
5 concludes that a reasonable jury could doubt Rolovich's sincerity, despite the  
6 evidence in his motion, then Rolovich concedes that his sincerity is an issue of  
7 fact not properly resolved on summary judgment. *See Id.* at 18, ll. 6-14.  
8

9  
10 To the extent WSU is asking the Court to rule that Rolovich's convictions  
11 are not religious, *id.* at 21, the Court should decline. Both reasons described in his  
12 exemption letter are grounded in Catholic teaching. ECF No. 88 at 12-14. As to  
13 Rolovich's convictions about aborted fetal issue, the Ninth Circuit has affirmed  
14 that such concerns count as "religious beliefs" that "conflict with receiving the  
15 COVID-19 vaccine." *Keene v. City & Cnty. of San Francisco*, No. 22-16567,  
16 2023 WL 3451687, at \*2 (9th Cir. May 15, 2023). As to Rolovich's convictions  
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22 <sup>1</sup> Rolovich follows WSU's practice and uses "Title VII" to refer to both Title VII and  
23 WLAD. *See* ECF No. 93 at 10, n.1.

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1 about therapeutic proportionality, the cases WSU relies on<sup>2</sup> are all ones where  
 2 “plaintiffs failed to adequately articulate their religious exemptions.” ECF No. 88  
 3 at 11 (collecting cases). WSU provides no example of a court that has rejected as  
 4 non-religious a conviction “rooted in identified teachings” and “developed  
 5 through study and consultation with religious authorities.” *Id.* at 12 (collecting  
 6 cases).  
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 9

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10 <sup>2</sup> *Fallon v. Mercy Cath. Med. Ctr. of Se. Pennsylvania*, 877 F.3d 487, 489 (3d Cir.  
 11 2017) (“While Fallon does not belong to any religious organization, he holds strong  
 12 personal beliefs”); *Finn v. Humane Soc’y of United States*, No. CV GLR-23-2107,  
 13 2024 WL 1765702, at \*4–5 (D. Md. Apr. 24, 2024) (“Finn [] does not identify if she  
 14 subscribes to any particular religion or the specific nature of any religious beliefs”);  
 15 *Bartholomew v. Washington*, No. 3:23-CV-05209-DGE, 2024 WL 1426308, at \*5  
 16 (W.D. Wash. Mar. 26, 2024) (Bartholomew “focused on his belief in his own  
 17 ‘natural immunity’”); *McCarthy v. Bos. Med. Ctr.*, No. CV 22-11886-RGS, 2024  
 18 WL 185392, at \*1 n.2 (D. Mass. Jan. 17, 2024) (plaintiff failed to “plead some  
 19 modicum of plausible facts sufficient to create an inference that the conflict arises  
 20 from some specific religious tenet or principle”); *Caruano v. Bayhealth Med. Ctr.,*  
 21 *Inc.*, 714 F. Supp. 3d 461, 468 n.3 (D. Del. 2024) (court found plaintiff had not  
 22 “sufficiently connected her objection to the vaccine to a religious belief tied to her  
 23 Christian faith”).

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1 In any event, WSU itself contends that the sincerity of a Title VII  
 2 plaintiff's religious belief is an issue of fact not properly resolved on a motion for  
 3 summary judgment. *Id.* at 18, ll. 6-14. At best, Rolovich has satisfied the  
 4 "sincerely held religious belief" element of his *prima facie* case (which is a "not  
 5 onerous" burden), and if the Court finds that he has not, WSU has conceded that  
 6 it is a question of fact for the jury to decide.

## 8 2. WSU has not established "undue hardship" as a matter of law

### 9 a. Title VII's Undue Hardship Standard

10 Just last year, the Supreme Court clarified an employer-defendant's burden  
 11 on the defense of undue hardship: "showing 'more than a *de minimis* cost' as that  
 12 phrase is used in common parlance, does not suffice to establish 'undue hardship'  
 13 under Title VII." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023). Instead, an "'undue  
 14 hardship' is shown when a burden is substantial in the overall context of an  
 15 employer's business." *id.* at 468, and "is more severe than a mere burden," *id.* at  
 16 469. Post-*Groff*, WSU "must show that the burden of granting an accommodation  
 17 would result in **substantial** increased costs **in relation** to the conduct of its  
 18 particular business." *Id.* at 470 (emphasis added).

19 WSU cannot "escape liability simply by showing that an accommodation  
 20 would impose some sort of additional costs. Those costs would have to rise to the  
 21

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1 level of hardship, and adding the modifier ‘undue’ means that the requisite  
2 burden, privation, or adversity must rise to an ‘excessive’ or ‘unjustifiable’ level.”  
3 *Id.* Additionally, WSU’s “[u]ndue hardship cannot be supported by merely  
4 conceivable or hypothetical hardships.” *WSU Tooley v. Martin–Marietta Corp.*,  
5 648 F.2d 1239, 1243 (9th Cir.1981) (affirming lower court’s finding that  
6 defendant’s proffered hypothetical costs did not constitute cognizable undue  
7 hardship). Further, “[w]here an employer determines a particular accommodation  
8 request would cause undue hardship, the employer must consider alternative  
9 accommodation options.” *Zimmerman v. PeaceHealth*, 701 F.Supp.3d 1099, 1111  
10 (W.D. Wash. 2023) (quoting *Groff*, 600 U.S. at 473).

13 Lastly, while WSU focuses on COVID-19 cases in which courts have  
14 granted summary judgment due to the “undue burden” caused to the employer,  
15 other recent COVID vaccination decisions in both the Ninth Circuit and  
16 elsewhere have allowed these claims to go forward to trial. For example, in  
17 *Chavez v. San Francisco Bay Area Rapid Transit Dist. (“BART”)*, in a case  
18 involving six plaintiffs with Title VII claims very similar to Rolovich’s claim, the  
19 court denied cross-motions for summary judgment on the view that “whether a  
20 given accommodation would cause undue hardship is, in any case, a fact-  
21 intensive inquiry.” No. C 22-06119 WHA, 2024 WL 3334741, at \*10 (N.D. Cal.

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1 Mar. 18, 2024). Relevant to this case, the *Chavez* trial court found that resolving  
 2 plaintiffs’ Title VII claims on summary judgment “would run afoul of the  
 3 Supreme Court’s discretion to engage in ‘context-specific application.’” *Id.* at \*12  
 4 (*quoting Groff v. DeJoy*, 600 U.S. 447, 473 (2023)). The court ultimately denied  
 5 the cross-motions for summary judgment and sent the issues to the jury, which  
 6 resulted in a \$7.4 million verdict for plaintiffs.  
 7

8 *Chavez* is one of at least four Title VII vaccine mandate cases where courts  
 9 in the Ninth Circuit have this year rejected employers’ motions for summary  
 10 judgment. In *Kidd v. Univ. Med. Ctr. of S. Nevada*, No. 2:22-CV-01990-ART-  
 11 NJK, 2024 WL 4046249 (D. Nev. July 2, 2024), the court held there were  
 12 material issues of fact on undue hardship given that defendant had “granted  
 13 religious exemptions to 85% of employees who requested them.” *Id.* at \*5–6 In  
 14 *Carroll v. Tobii Dynavox LLC*, No. 523CV00124HDVSPX, 2024 WL 1600632  
 15 (C.D. Cal. Apr. 3, 2024), the court held there were issues of material fact on  
 16 “whether [the defendant] engaged in a good-faith effort to explore various  
 17 possible accommodations.” *Id.* at \*6. Though the defendant produced evidence  
 18 that it had reviewed the possibility of accommodating the plaintiff, it was unclear  
 19 whether the employer had even “sat down with [p]laintiff to review and discuss  
 20 other options.”) *Id.* Finally, in *Varkonyi v. United Launch All., LLC*, No. 2:23-CV-  
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1 00359-SB-MRW, 2024 WL 1677523 (C.D. Cal. Feb. 21, 2024), the court denied  
 2 summary judgment because employer's undue hardship arguments did not take  
 3 into account that its workforce was over 90% vaccinated. *Id.* at \*5. The court  
 4 also found that while the employer had offered many undue hardship arguments,  
 5 "the problem with this evidence is that none of it demonstrates how much it  
 6 would have cost [defendant] to accommodate [plaintiff]." *Id.*

8 **b. Rolovich's "increased risk of contracting and transmitting**  
 9 **COVID-19" is largely hypothetical and whether it**  
 10 **constituted an undue hardship is a question of fact**

11 WSU's "public safety risk" argument is mostly hypothetical. WSU argues  
 12 that Rolovich's unvaccinated status caused such a heightened public health risk  
 13 that it imposed an undue burden. However, this argument ignores the risk that  
 14 WSU had already willingly undertaken, and is now applied to Rolovich  
 15 differently. At the time Rolovich was terminated, WSU was already halfway into  
 16 the 2021 season, had been testing all unvaccinated coaches (and presumably  
 17 players under the Pac-12 guidelines at the time), and had provided exemptions to  
 18 fourteen unvaccinated players while providing no accommodations to them nor  
 19 making any changes to their interactions with the football team and/or travel and  
 20 lodging accommodations for away games. SADMf ¶¶ 4, 24, and 199.

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1           WSU had already evaluated the risk of public safety and determined it  
2 could move forward with unvaccinated individuals on the football team. While  
3 Proclamation 21-14 did not apply to students, WSU itself had a vaccine  
4 requirement for students, as well as exemption process. *See* WSU Statement of  
5 Undisputed Facts, ¶ 43. Tellingly—and in the face of the same public health  
6 considerations that allegedly informed WSU’s consideration of Rolovich’s  
7 exemption request—WSU granted exemptions to 14 unvaccinated players (12  
8 religious and two medical exemptions). SADMf ¶ 4. A reasonable jury could  
9 deduce from such evidence that accommodating Rolovich would not have posed  
10 an incremental public safety risk that would rise to the level of an undue hardship.  
11 While WSU argues that the head coach position carried unique duties, the jury  
12 may take note of the fact that players would not only have had considerable and  
13 prolonged physical contact with another on the field, in lockers, and in practice,  
14 they also interacted with the general student population and mixed in dormitories  
15 and housing.

16  
17           WSU’s reliance on the typical interactions of the current football coach,  
18 Jake Dickert, is misleading at best. The interactions which Jake Dickert claims to  
19 have in a typical day are what is experienced *now*, not what was experienced in  
20 2021 or even 2022. The interactions in 2021 and 2022 were limited, due to

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1 guidelines and policies in place by Washington and by WSU itself. Recruiting  
2 itself had been adjusted by Pac-12, as further discussed below, which had moved  
3 a significant portion of recruiting through Zoom. At a time when most people had  
4 limited interactions, WSU now argues that, at a time Americans were practicing  
5 social distancing, Rolovich's recruiting activities would have involved extensive  
6 travel to, and into, recruits' home. In fact, Pac-12 had instituted recruitment dead  
7 periods up through May 31, 2021. Remote recruiting was the norm for the months  
8 leading up to June 1, 2021. SADM F ¶ 68.

11 The evidence in the record shows that the refusal to accommodate  
12 Rolovich was WSU succumbing to pressure from external forces instead of  
13 complying with Title VII. The status of players was not public, and so there were  
14 no negative reactions or pressure from fans, alumni, donors, or the public. The  
15 argument of the safety risk that one unvaccinated coach would have had is  
16 hypothetical at this point and undermined by the numerous exemptions and  
17 accommodations that WSU already provided to members of the football team.  
18 That WSU granted these exemptions, and accommodated (or decided no special  
19 accommodations were necessary even given their unvaccinated status) these  
20 players throughout the 2021 and 2022 football seasons, is direct evidence that  
21 contradicts WSU's assertion of any alleged undue hardship. That WSU chose not  
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1 to isolate or distance the unvaccinated players during travel for games is further  
2 evidence from which a jury could conclude that the alleged public safety risk of  
3 allowing the head coach, like his players, to remain unvaccinated would not have  
4 posed an undue hardship. SADMf ¶ 205.

6 The hypothetical and conjectural nature of WSU's "public safety risk"  
7 argument is underscored by the four weeks of pre-season camp coupled with the  
8 seven games of the 2021 season that WSU's football team had already completed.  
9 Over ten weeks in which numerous players and coaches – unvaccinated –  
10 interacted with other members of the football program, participated in practices,  
11 training, travel, and games. And during these ten plus weeks, there were no  
12 outbreaks. SADMf ¶¶ 205 & 210. The scenarios that WSU now offers are  
13 merely hypotheticals.

16 Further, the analysis of whether Rolovich's unvaccinated status had such  
17 an incremental impact on public safety as to cause an undue hardship must be  
18 viewed at the time, based upon what was known at the time. "It is axiomatic that  
19 an employer can make decisions based only on the information known to it at the  
20 time of the decision." *Lavelle-Hayden v. Legacy Health*, No. 3:22-CV-01752-IM,  
21 2024 WL 3822712, at \*10 (D. Or. Aug. 14, 2024) (quoting *Kluge v. Brownsburg*

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1 *Cnty. Sch. Corp.*, 64 F.4th 861, 888 (7th Cir. 2023)). As the *Lavelle-Hayden*  
 2 court explained:

3 Along with considering both economic and non-economic costs when  
 4 assessing undue hardship, this Court further holds that it is  
 5 appropriate to confine the analysis to the information available to the  
 6 employer when it made its undue hardship decision. This approach  
 7 comports with how courts analyze whether a plaintiff has alleged a  
 8 prima facie case against an employer—by assessing the information  
 the plaintiff provided to the employer and, thus, the information of  
 which the employer had notice.

9 *Id.*

10 As of October 18, 2021, WSU knew the risks of unvaccinated individuals  
 11 and the impact of those unvaccinated individuals on the football team. It had  
 12 guidelines in place for the team, and weekly testing. SADMf ¶ 140. Based upon  
 13 what was known at the time, there was no incremental impact on public safety  
 14 caused by Rolovich that rises to the level of establishing an undue hardship upon  
 15 WSU's football program as a matter of law.

17 **c. A reasonable jury, viewing the evidence in the light most**  
 18 **favorable to Rolovich, could find that the fiscal costs of**  
 19 **providing accommodation did not constitute an undue**  
 20 **hardship**

21 WSU cites a parade of horrors regarding the *theoretical* fiscal costs of  
 22 accommodating Rolovich. WSU asserts that the cost of accommodating  
 23 Rolovich's exemption request would have approximated \$196,500 in additional

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1 travel costs and that it would constitute an undue economic hardship. ECF No. 93  
2 at 30-31. But courts must “apply the [undue hardship] test in a manner that takes  
3 into account all relevant factors in the case at hand, including the particular  
4 accommodations at issue and their practical impact in light of the nature, size and  
5 operating cost of [an] employer.” *Groff*, 600 U.S. at 470-71 (internal quotations  
6 omitted). Thus, this \$196,500—even if the jury credits it—is the cost of travel  
7 accommodations across two football seasons. SADMf ¶ 225.  
8

9  
10 Relevant here are the total operating expenses and revenues of the WSU  
11 football program over the years. For the 2018 through 2022 football seasons,  
12 WSU’s total operating expenses ranged from \$16,533,539 to \$25,335,772.  
13 SADMf ¶ 221. When deposed, WSU’s expert admitted that he failed to  
14 determine the actual costs for each season and performed no calculation to  
15 determine the costs against the overall operating expenses. SADMf ¶ 224.  
16 Rather, he only looked at the incremental cost across two seasons. *Id.*  
17

18 WSU’s estimated cost of \$28,500 for hiring separate buses, which WSU  
19 incorrectly stated was for the 2021 season, ECF No. 93 at 31; ECF No. 94 at ¶  
20 197, is for a total of 13 games across two football seasons. SADMf, ¶ 200. If  
21 \$196,500 is compared against total expenses for the 2021 and 2022 seasons (a  
22 total of \$48,158,117), it amounts to 0.4 percent of WSU’s total expenses.  
23

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1 Compared against the team travel expenses alone (a total of \$2,696,708), it  
2 amounts to 7.295 of the travel expenses across two seasons. SADMf, ¶ 202.  
3 These costs are minimal and do not rise to the level of undue hardship to bar  
4 accommodation requirements under Title VII.  
5

6 This economic analysis not only is a litigation-inflated number, but is also  
7 hypothetical and speculative. *Lavelle-Hayden*, 2024 WL 3822712, at \*10 (“It is  
8 axiomatic that an employer can make decisions based only on the information  
9 known to it at the time of the decision.”) For example, WSU’s non-retained  
10 expert Dr. Guy Palmer—whom another WSU expert, David Bones, relied upon  
11 exclusively to calculate the costs of accommodation—“would have also  
12 recommended that” all unvaccinated coaches would have had to travel separately  
13 – by chartered plane, separate buses, and separate accommodations. ECF No. 106  
14 at 34, ¶ 60; ECF No. 96 at 27-28. These are litigation-manufactured  
15 recommendations that go beyond what the Athletics Department and Pac-12’s  
16 required, or what WSU actually did with respect to exempted unvaccinated  
17 players.  
18  
19

20 In reality, Dr. Palmer’s primary recommendations were for WSU to  
21 “follow all requirements from the Athletics Department and the Pac-12.” ECF  
22 No. 106 at 34, ¶ 59. The Athletics Department’s accommodations would have  
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1 been wearing masks and maintaining social distancing. *Id.* The Pac-12 would  
2 have required surveillance testing of a PCR test or three antigen tests per week,  
3 negative PCR test prior to any games, refraining from returning to campus from  
4 *non-team* related travel without a negative PCR test, and quarantining upon return  
5 to campus from any *non-team* related travel until a negative PCR test was  
6 obtained. *Id.* The cost of quarantine and testing would have been minimal—so  
7 minimal that WSU’s expert did not find them worthy of analysis. SADMf ¶ 226.  
8 Further, these testing costs had already been undertaken by WSU throughout the  
9 2021 football season.  
10  
11

12 At trial, the jury may reasonably find that Rolovich’s separate travel would  
13 not have posed an undue hardship, whether evaluated in context of WSU’s overall  
14 operations or evaluated just in the context of the football program. WSU  
15 generated total operating revenue of \$47,625,476 in the 2021 football season and  
16 \$48,758,639 in the 2022 football season. ECF No. 96 at 66-67. A jury could  
17 reasonably find that these added costs did not “rise to the level of hardship” of  
18 being “excessive” or “unjustifiable.” Given the small percentages and that WSU  
19 already chartered flights for its football team, these accommodation expenses  
20 would not be “unduly costly, extensive, substantial, or disruptive, or that would  
21 fundamentally alter the nature or operation of the business” of the football team  
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1 and WSU. *Poole v. Centennial Imports, Inc.*, No. 2:12-cv-00647-APG-VCF, at  
2 \*10 (D. Nev. May 19, 2014).

3 Additionally, the largely hypothetical nature of the cost of accommodating  
4 Rolovich is further evidenced by the football players were unvaccinated and  
5 traveling *with* the rest of the team (players and coaches that were vaccinated),  
6 SADMf, ¶ 4. There is even less basis for WSU to take on additional costs to  
7 provide different and exclusive accommodations to Rolovich by the fictitious  
8 assumption that he would have needed to travel separately from both vaccinated  
9 and unvaccinated members of the football team.  
10  
11

12 It is entirely unclear why WSU would have needed to charter a separate  
13 plane and a separate bus for Rolovich. This is especially true given that the record  
14 shows WSU did not take that measure (separate charter transportation) for the 14  
15 unvaccinated players whom WSU granted exemptions. *Id.* A reasonable jury  
16 could conclude that there was no need for separate accommodation, and therefore  
17 WSU created its own illusion of hardship. Simply put, there was no undue  
18 hardship to accommodate Rolovich.  
19  
20

21 Even assuming that the accommodations provided to unvaccinated players  
22 included separate travel from the rest of the team, it is inconceivable that the  
23 incremental cost of including Rolovich to those travel costs would cause an undue  
24

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1 hardship. There is also no evidence that WSU considered alternative options at  
 2 the time. *United States v. Cal. Dep't of Corr. & Rehab.*, 2:24-cv-00925-DJC-DB,  
 3 at \*30 (E.D. Cal. June 20, 2024) (“ The Supreme Court’s ruling in *Groff* is clear  
 4 that before declaring that providing an accommodation for an employee’s  
 5 religious beliefs creates an undue hardship, an employer must consider other  
 6 options, not simply assess ‘the reasonableness of a particular possible  
 7 accommodation or accommodations.’”). For example, WSU already had the costs  
 8 of weekly testing and seven games that were played under this model, yet this  
 9 alternative was not considered. Dr. Palmer had recommended that the Pac-12  
 10 guidelines and Athletics Department policies were followed. While Mr. Bones  
 11 admitted that these costs were minimal, there is no evidence that WSU considered  
 12 these alternative *and reasonable* accommodations, which certainly would not  
 13 have posed an undue hardship due to their minimal costs.

14 WSU has not established that, as a matter of law, its litigation-generated  
 15 calculation of speculative fiscal costs would pose an undue hardship.

16  
 17 **d. Donor Opposition to Accommodating Rolovich Is Not**  
 18 **Cognizable to Factor into Undue Hardship**

19 WSU contends that the *potential* lost donations would have caused an  
 20 undue hardship for the University. EFC No. 93 at 25-26 (“Accommodating  
 21 Rolovich also *risked* the loss of significant revenue” (emphasis added)).

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1 Specifically, WSU argues that many high-level donors had expressed “anger and  
2 disappointment that Rolovich was endangering the WSU committee.” *Id.* at 25.

3 WSU contends that after the termination of Rolovich, \$3.5 million was donated.  
4 ECF No. 94 ¶ 208. However, WSU has withheld whether the impetus for the \$3.5  
5 million in donations was specifically because of Rolovich’s termination, or that it  
6 had been withheld because WSU had continued to employ Rolovich.  
7

8 First, as noted above, under *Groff* any alleged undue hardship must be  
9 measured against the overall context of the employer’s business. “[T]he decision  
10 of whether a particular accommodation works an undue hardship on ... an  
11 employer ... must be made by considering ‘the particular factual context of each  
12 case.’” *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981)  
13 (quoting *Anderson v. General Dynamics Convair Aerospace Div.*, 489 F.2d 397,  
14 400 (9th Cir. 1978)).  
15  
16

17 Here, WSU represents that in a typical year its football program typically  
18 received between \$2.3 and 3.8 million in donor contributions. ECF No. 94 ¶ 204.  
19 The money that had allegedly been threatened to be withheld were donations  
20 overall to WSU, not those specifically earmarked for the athletics department as a  
21 whole. From fiscal year 2018 through 2023, the WSU Athletics Department  
22 received donations that ranged from \$7.7 to 14.5 million. SADMF ¶ 210.  
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1 In fiscal year 2022, WSU received \$120.9 million in philanthropic support,  
2 “the highest activity since FY2015.” SADMf ¶ 213. In fiscal year 2023, WSU  
3 received \$167.9 million in annual fundraising. *Id.* The threatened withholding of  
4 donations, and the economic impact of such withheld donations, must also be  
5 analyzed in the context of the business – WSU as a whole. The range of \$2.3 to 3.8  
6 million which WSU’s football program receives is nominal from the overall  
7 donations WSU receives each year.  
8

9  
10 WSU claims that multiple donors explicitly threatened to withhold further  
11 donations, but only provides that one donor canceled a \$1 million bequest to the  
12 university and that another reinstated a \$1.5 million bequest after Rolovich’s  
13 termination. The others shown in the table provide that most have given, over their  
14 lifetime, less than \$500,000. ECF No. 102, pp. 17-18. More importantly, is what  
15 level their giving was over the years. Only two gave \$25,001 and above each year,  
16 from fiscal years 2021 through 2023. *Id.*  
17

18 When compared against the annual giving WSU received each year, the  
19 economic impact of the threatened withholding of donations (which is something  
20 every university must contend with, as it is the nature of their business) amounts  
21 to approximately one percent of the giving it received. This does not count as  
22 “significant” under *Groff*.  
23

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1 Second, and more fundamentally, the Supreme Court made clear in *Groff*  
2 that Title VII forbids This takes into consideration the sentiments and opinions of  
3 donors to WSU. However, current Title VII jurisprudence forbids failure-to-  
4 accommodate by proxy. The *Groff* Court noted that, to the extent it “was not  
5 previously clear,” “a coworker’s dislike of ‘religious practice and expression in  
6 the workplace’ or ‘the mere fact [of] an accommodation’ is not ‘cognizable to  
7 factor into the undue hardship inquiry.’” 600 U.S. at 472. The Court elaborated  
8 that, “a hardship that is attributable to employee animosity to a particular religion,  
9 to religion in general, or to *the very notion of accommodating religious practice*  
10 cannot be considered ‘undue.’” *Id.* (emphasis added).

13 The Supreme Court’s caution about taking co-worker hostility into account  
14 applies with full force to WSU’s reliance on its donors’ sentiments: “If bias or  
15 hostility to a religious practice or a religious accommodation provided a defense  
16 to a reasonable accommodation claim, Title VII would be at war with itself.”

18 *Id.* Here, permitting donors to influence the decision of whether an  
19 accommodation is appropriate, is contrary to Title VII caselaw and its purpose.  
20 “If relief under Title VII can be denied merely because the majority group of  
21 employees, who have not suffered discrimination, will be unhappy about it, there  
22 will be little hope of correcting the wrongs to which the Act is directed.”

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1 *Anderson v. v. General Dynamics Convair Aerospace Div.*, 489 F.2d 397, 402  
 2 (9th Cir. 1978) (quoting *U.S. v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir.  
 3 1971)).

4  
 5 Given the financial model of universities, donors are comparable to a  
 6 business' customers. In *Diaz v. Pan Am World Airways, Inc.*, the court held that  
 7 customer preference may be taken into account only when it is based on the  
 8 company's inability to perform the primary function or service it offers. 442 F.2d  
 9 385 (5th Cir. 1971). Here, WSU's core function is to educate its students.

10  
 11 For all these reasons, WSU's donors' "expressed anger and  
 12 disappointment" at Rolovich's decision to exercise his rights under Title VII, the  
 13 WLAD, and the Governor's Proclamation are not relevant to the undue hardship  
 14 analysis. Even if the donations that were withheld were substantial in the context  
 15 of WSU's operations—which they were not—the donors' bias against Rolovich's  
 16 request for a religious accommodation cannot be considered under the Title VII  
 17 undue hardship analysis.

18  
 19 **e. Hypothetical game cancellations and lost ticket revenue do**  
 20 **not constitute cognizable "undue hardship," must less**  
 21 **establish undue hardship as a matter of law**

22 The argument now of potential cancelled games and lost ticket revenue is a  
 23 claim of undue hardship that WSU offers now, during litigation. At the time

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1 Rolovich was terminated, no games had been cancelled. No outbreaks had  
2 occurred. And this was under the existing weekly testing that WSU had  
3 undertaken, which it then cancelled once it terminated all of the football coaches.  
4 At the time Rolovich was provided the Notice of Intent to Terminate, the alleged  
5 undue hardship from cancelled games and lost ticket revenue was not a factor in  
6 consideration. This is because at that time, WSU was aware that there would be  
7 no cancelled games as a result of Rolovich's unvaccinated status. Therefore, it  
8 was not a factor or point of consideration in WSU's undue hardship analysis.  
9

10  
11 Now, during litigation, WSU has developed an analysis of cancelled games  
12 and potential lost ticket revenue as a result, in order to increase their numbers for  
13 the undue hardship analysis. At this time, it is known that in the 2021 season,  
14 Pac-12 did not cancel the one game that was impacted by COVID-19, but instead  
15 rescheduled it. Therefore, the potential lost ticket revenue, media rights, and  
16 conference distributions are all hypothetical and created for litigation. "The Ninth  
17 Circuit has echoed the Sixth Circuit's 'skepticism' about 'hypothetical  
18 hardships' based on assumptions about accommodations which have never been  
19 put into practice.'" *E.E.O.C. v. Alamo Rent-A-Car LLC*, 432 F.Supp.2d 1006,  
20 1016 (D. Ariz. May 26, 2006) (quoting *Anderson v. General Dynamics Convair*  
21 *Aerospace Division*, 589 F.2d 397, 402 (9th Cir. 1978)).  
22  
23

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1 Under this faulty series of hypotheticals, “virtually no accommodation  
2 could overcome the undue hardship test.” *Id.* WSU has asserted facts that are  
3 grounded only in assumptions in what could have happened, and opinion based  
4 on hypothetical scenarios, developed long after the 2021 and 2022 football  
5 seasons to support litigation. “Because ‘undue hardship cannot be proved by  
6 assumptions nor by opinions based on hypothetical facts .... [WSU] has not  
7 raised a material factual issue concerning undue burden.” *Id.* at 1017.  
8

9  
10 Furthermore, the canceled games and resulting lost ticket revenue, media  
11 rights, and conference distributions is admitted by WSU to not be an undue  
12 hardship based upon their actions. This was a risk that WSU had already accepted  
13 when it granted exemptions to 14 football players, and did not require any  
14 accommodations or changes to the team despite the 14 unvaccinated football  
15 players. Despite the 14 unvaccinated football players, WSU did not cancel any  
16 games in the 2021 or 2022 football seasons before the vaccine mandate was  
17 lifted. WSU had already determined that the potential losses from a COVID-19  
18 outbreak on the football team, due to unvaccinated individuals, was not an undue  
19 hardship to prevent providing exemptions or to even require accommodations.  
20  
21 WSU had determined these potential losses were not “substantial” in the context  
22 of WSU’s business.  
23

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**f. The arguments offered by WSU related to alleged reputational and institutional damage are based on faulty assumptions of fact and do not amount to “undue hardship” as a matter of law**

WSU’s position regarding the impact on reputation is related to Rolovich’s ability to meet with donors, fans, alumni, the public-at-large, fans, the media, and that the football team itself was significantly limited in 2021. ECF No. 93 at 34-35. However, each of these limitations existed because WSU refused to contemplate any alternative options or accommodations. *See generally*, ECF Nos. 93 and 94. Rather, WSU determined that in-person interactions were required, and therefore it could not accommodate Rolovich.

However, there is nothing that made in-person interactions a requirement to achieve the job duties of cultivating relationships. During a period where the pandemic was still in place, and society had largely learned to interact and build relationships virtually, it is strange that WSU contends its reputation could only be cultivated through in-person interactions. WSU admits that it canceled a number of previously scheduled in-person donor events, yet WSU provided no alternatives, made no other plans to conduct other forms of interaction – something that nearly every charitable organization had to shift to in order to continue operating during the pandemic shut-down.

“Although Title VII ‘directs that any reasonable accommodation by the  
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1 employer is sufficient to meet its accommodation obligation,’ the availability of  
2 options that would allow the employee to keep working may affect the  
3 reasonableness of an option that would not.” *Zimmerman v. PeaceHealth*, 701  
4 F.Supp.3d 1099, 1110 (W.D. Wash. 2023) (quoting *Ansonia Bd. Of Educ. V*  
5 *Philbrook*, 479 U.S. 60, 68 (1986)). “Where an employer determines a particular  
6 accommodation request would cause undue hardship, the employer must consider  
7 alternative accommodation options.” *Zimmerman v. PeaceHealth*, 701 F.Supp.3d  
8 1099, 1111 (W.D. Wash. 2023) (quoting *Groff*, 600 U.S. at 473).

11 There is no evidence WSU considered any alternatives to accommodate  
12 Rolovich as it related to interactions with fans, alumni, donors, and the public-at-  
13 large to determine whether they were reasonable and could be implemented. At  
14 the time of Rolovich’s termination, weekly testing was already in place as  
15 required by Pac-12 (and should have continued even after Rolovich’s termination  
16 due to Pac-12 rules). Therefore, WSU had sufficient information as to whether  
17 Rolovich could attend these events, if it had continued the weekly COVID-19  
18 tests.

21 WSU relies upon the objections and negative reaction to Rolovich’s  
22 unvaccinated status. However, WSU admittedly was receiving a mixture of  
23 responses to Rolovich’s unvaccinated status. Instead of providing reasonable

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1 accommodation, and providing the necessary public relations support for it, WSU  
 2 opted to simply walk away and refuse to accommodate, claiming an “undue  
 3 hardship” that it cannot prove.  
 4

5 **g. WSU’s recruitment analysis is factually incorrect and, at a**  
 6 **minimum, raises a factual issue for the jury**

7 It is important to note that the NCAA did not permit in-person recruiting  
 8 from March 2020 to June 1, 2021. Vaccine status was not relevant, it was simply  
 9 not permitted. Rolovich was not permitted to recruit from August 1, 2021 through  
 10 August 31, 2021 per the NCAA rules. SADMF ¶ 70. The permitted evaluation  
 11 period ran from September 1, 2021 through November 27, 2021. *Id.* at ¶ 71.

12 However, during this period, no in-person, off-campus recruiting contacts with  
 13 the prospective student-athlete was permitted. *Id.* It was not until the contact  
 14 period of November 28, 2021 through December 11, 2021 that Rolovich could  
 15 have engaged in in-person, off-campus recruiting. *Id.* Rolovich was terminated on  
 16 October 18, 2021, long before he could have engaged in any in-person recruiting.  
 17

18 Further, WSU contends that Rolovich did not leave campus for the purpose  
 19 of recruiting between January 1 and September 30, 2021, because of his  
 20 unvaccinated status, which caused him to lag behind in recruiting. ECF No. 93 at  
 21 33-34; ECF No. 94 at ¶ 94. And that further, as training began in June 2021, “it  
 22 would not have been practical for Rolovich to quarantine for five-day periods” if  
 23

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1 he left for in-person recruiting. *Id.* However, this position fails to take into  
2 account the NCAA recruiting calendar. The NCAA had put in place an immediate  
3 ban on in-person recruiting for Division I coaches and put in place a recruiting  
4 dead period at the onset of COVID-19 on March 18, 2020. SADMF ¶ 70. This  
5 dead period was continuously extended throughout 2020. *Id.* On November 18,  
6 2020, the NCAA extended the recruiting dead period for all Division I sports  
7 through April 15, 2021. *Id.* This dead period did not allow in-person recruiting.  
8 *Id.* Instead, the NCAA permitted additional flexibility in virtual recruiting in  
9 football by allowing all coaches, full-time school staff members and current  
10 students to conduct recruiting calls (telephone and video) without a countable  
11 coach being present. *Id.* On February 17, 2021, the NCAA extended the dead  
12 period through May 31, 2021. *Id.* Therefore, Rolovich could not perform any in-  
13 person recruiting from January 1, 2021 through May 31, 2021.  
14  
15  
16

17 In June 2021, there was no vaccine mandate nor any restrictions on the  
18 participation of coaches that were unvaccinated. The NCAA permitted on-campus  
19 evaluations during unofficial visits during the days football camps and clinics  
20 were allowed in June and July 2021 only, but otherwise the recruiting calendar  
21 was followed with a waiver of the telephone call legislation. SADMF ¶ 71. The  
22 quiet period (which does not permit in-person recruiting contacts or evaluations  
23

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1 on or off WSU's campus) ran from June 1 through June 27, 2021. *Id.* The dead  
2 period ran from June 28, 2021 through July 24, 2021, followed by a quiet period  
3 from July 25, 2021 through July 31, 2021. *Id.* For the 2021-2022 recruiting  
4 period, the dead period was in place from August 1, 2021 through August 31,  
5 2021. *Id.*

7         Simply, Rolovich was severely restricted, by the NCAA, from in-person  
8 recruiting. Once the football season began, Rolovich's focus was on the team and  
9 its performance for that season. Even then, no in-person, off-campus recruiting  
10 contacts were permitted during the evaluation period of September 1, 2021  
11 through November 27, 2021. *Id.* Further, other coaches could have contributed to  
12 the recruitment, as was part of their job. Due to the significant dead periods that  
13 were instituted by the NCAA, it is only logical that his recruitment numbers are  
14 different from Jake Dickert, who had no such restrictions in place during his  
15 recruitment period.  
16

18         For the 2022 season, which is a mixture of recruits from Rolovich and  
19 Dickert, there were 27 enrollees, 19 of which were scholarship enrollees. Of those  
20 19, 7 had committed to WSU under Rolovich in 2021. SADMF ¶ 5. This was all  
21 obtained after offers were made under significant dead periods imposed by the  
22 NCAA. In short, the impact on recruiting as a result of Rolovich's unvaccinated  
23

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1 status was minimal. WSU has not shown that Rolovich's unvaccinated status  
 2 damaged WSU's football program and its ability to recruit and fill its roster.

3  
 4 WSU has failed to establish undue hardship as a matter of law. Based on  
 5 the record, WSU's cited hardships are either litigated-created statistics that WSU  
 6 did not calculate or know at the time it terminated Rolovich or are sufficiently  
 7 minimal in the overall context of WSU's business that a reasonable jury could  
 8 find them not to be "undue."

9  
 10 **3. In the alternative, disputed facts regarding WSU's motives  
 preclude summary judgment on Rolovich's Title VII claim**

11 According to WSU, an "undue hardship" is a "complete defense" to  
 12 Rolovich's Title VII (and WLAD) claim. ECF No. 93 at 16. Fortunately for  
 13 Rolovich and civil rights plaintiffs everywhere, WSU is mistaken. Federal civil  
 14 rights law does not let bad actors off the hook so easily. The 1991 Amendments  
 15 to Title VII "expressly overruled the basic premise that an employer could avoid  
 16 all liability under Title VII by establishing the absence of 'but for' causation."  
 17 *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 850–51 (9th Cir. 2002).

18  
 19 As amended, Title VII's "disparate-treatment provision prohibits actions  
 20 taken with the *motive* of avoiding the need for accommodating a religious  
 21 practice." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774  
 22 (2015). *See also* 42 U.S.C. § 2000e-2(m). "[M]otive is especially easy to infer  
 23

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1 where an employee has submitted a request for an accommodation or where the  
2 employer knows of the employee's religious practice." *Hebrew v. Texas Dep't of*  
3 *Crim. Just.*, 80 F.4th 717, 724 (5th Cir. 2023).

4  
5 The Ninth Circuit has held that a plaintiff may establish her Title VII case  
6 by "simply produc[ing] direct or circumstantial evidence demonstrating that a  
7 discriminatory reason more likely than not motivated [the employer]." *McGinest*  
8 *v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir.2004). Even "a single  
9 discriminatory comment by a plaintiff's supervisor is decisionmaker is sufficient  
10 to preclude summary judgment for the employer." *Dominguez-Curry v. Nev.*  
11 *Transp. Dep't*, 1039 (9th Cir. 2005).

13 In Section B.3 below, Rolovich details a litany of text messages and  
14 statements that create issues of fact as to whether WSU followed its own  
15 procedures and acted in good faith in the course of denying Rolovich's request for  
16 a religious exemption. Under the same evidence, a reasonable jury could easily  
17 find that WSU was motivated to deny Rolovich's request for a religious  
18 accommodation or that it made disparaging remarks about his religious beliefs.

19 These facts preclude summary judgment for WSU on Rolovich's Title  
20 VII/WLAD claim.  
21  
22

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**B. WSU Is Not Entitled to Summary Judgement Rolovich's Claim for Breach of Contract**

In its Brief, WSU summarily addresses Rolovich's breach of contract claim in one short paragraph, Brief at 38, and incorrectly concludes that this cause of action is irrevocably tethered to Rolovich's Title VII claim. WSU's perfunctory treatment of this claim is premised on its assumption that disposing of Rolovich Title VII claim automatically disposes of his breach of contract claim. That is not the case.

Admittedly, the Court's May 30, 2023 Order regarding Defendants' Motions to Dismiss noted that "Plaintiff's breach of contract claim rests on the determination of whether Plaintiff's exemption and accommodation would have imposed an undue hardship." ECF No. 33 at 27. Both this dicta and WSU's assumption that Rolovich's breach of contract claim must necessarily fail if his Title VII fails appear premised on a misunderstanding of the nature of the breaches that Rolovich has alleged. They also overlook what discovery has revealed over the intervening 17 months since the May 30, 2023 Order.

At its core, Rolovich's breach of contract argument is that – even if the finder of fact concludes that accommodating Rolovich would have imposed an undue hardship (thus relieving WSU from Title VII liability) – WSU breached his contract by characterizing his resulting termination as a "just cause" termination.

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1 Rolovich contends that this was done in order to avoid owing liquidated damages  
 2 to Rolovich.<sup>3</sup> Although WSU's Brief elides it, Rolovich has also pled that WSU's  
 3 actions in his termination also breached the duty of good faith and fair dealing.  
 4 SAC at 24, ll. 9-10 ("COUNT I - BREACH OF CONTRACT – BREACH OF  
 5 IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING"). *See also*  
 6 *id.* ¶ 111 ("WSU's decision and actions in terminating Mr. Rolovich, and  
 7 asserting that it had just cause to do so, also constituted a breach of the implied  
 8 warranty of good faith and fair dealing.").

11 Whether an employer properly determined that it had just cause for a  
 12 termination is a factual question for the jury. *Lund v. Grant Cnty. Pub. Hosp.*  
 13 *Dist. No. 2*, 85 Wash. App. 223, 228, 932 P.2d 183, 185 (1997); *see also Trainer*  
 14 *v. Kitsap Cnty.*, 107 Wash. App. 1035 (2001) ("[I]t was and is the proper role of  
 15 the jury to determine just cause."). Given that WSU has not presented *any*  
 16 evidence on the topic, the Court should allow this cause of action to proceed to  
 17 the jury. Additionally, Rolovich highlights below multiple examples of why the  
 18

---

20 <sup>3</sup> It is not disputed that WSU could have terminated Rolovich's employment at  
 21 any time. But his Employment Agreement required that WSU pay Rolovich  
 22 liquidated damages in the amount of 60% of his salary for the remainder of his  
 23 five-year term unless the termination was for "just cause."

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1 issue of whether WSU properly terminated Rolovich’s employment agreement for  
 2 “just cause” is a question of fact for a jury.

3  
 4 **1. Official FAQs accompanying Proclamation 21-14 imposing the**  
 5 **mandate provided that terminations for refusal to get vaccinated**  
 6 **were to be “non-disciplinary”**

7 On August 9, 2021, Governor Jay Inslee issued a binding directive which  
 8 mandated that Washington State employees who refused to receive the COVID-  
 9 19 vaccine should *not* receive any type of disciplinary termination  
 10 characterization. SADM F ¶ 167. Specifically, accompanying Proclamation 21-14  
 11 were “FAQs for vaccine mandate for some state employees and certain private  
 12 employers” (“FAQS”). *Id.* One FAQ specifically reads: “What if someone  
 13 refuses to get vaccinated?” Answer: “[E]mployees who refuse will be subject to  
 14 *non-disciplinary dismissal* from employment for failing to meet the qualifications  
 15 of the job.” *Id.* (emphasis added). Whatever persuasive authority the FAQs may  
 16 have, a jury could well conclude this guidance should have guided WSU’s “just  
 17 cause” determination. *Id.* at ¶ 209.

18  
 19 Lisa Gehring, a member of WSU’s HRS department, acknowledged in her  
 20 deposition that this language from the FAQs meant WSU was precluded from  
 21 firing someone “for cause” based on an employee’s failure to comply with the  
 22 vaccine mandate. *Id.* A reasonable jury could find that, in light of the  
 23

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1 unambiguous language in the Governor’s FAQs, WSU erred when it elected to  
 2 terminate Rolovich for “just cause.”

3 **2. WSU negotiated and included language in other football coaches’**  
 4 **agreements concerning the consequences of electing not to get**  
 5 **vaccinated. No such provision was included in Rolovich’s**  
 6 **employment agreement.**

7 Other WSU football coaches were similarly terminated based on their  
 8 failure to receive the COVID-19 vaccine. SADMf ¶ 217. These coaches had  
 9 contracts that were largely identical to Rolovich’s except for this material  
 10 difference: the assistant coaches’ agreement expressly included an obligation  
 11 missing from Rolovich’s agreement: **“Employee agrees to follow all federal,**  
 12 **state, and local health directives as well as university policies related to**  
 13 **health and safety.”** *Id.* (emphasis in original). This inclusion and omission raise a  
 14 question for trial – namely, whether the omission in Rolovich’s agreement of a  
 15 requirement to “follow all federal, state, and local health directives” should have  
 16 factored into WSU’s “just cause” termination decision. Even more specifically, it  
 17 raises an issue of fact as to whether WSU’s “just cause” determination should be  
 18 viewed by the jury with added skepticism since WSU was capable to negotiating  
 19 the “shall follow all health directives” provision when in fact it wished to make it  
 20 clear that failure to follow such directives was a term of employment. In a related  
 21 vein, a reasonable jury could conclude that WSU’s diligence in amending other

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1 coaches' contracts indicates that WSU believed it gained something that it did not  
2 believe it had under Rolovich's agreement. There is an issue of fact (a) as to  
3 whether WSU failed to follow its own stated procedures for evaluating  
4 Rolovich's exemption request and (b) if so, whether such failure breached the  
5 implied covenant of good faith and fair dealing.  
6

7       There are significant issues of material fact as to whether WSU resolved  
8 Rolovich's request for a religious exemption according to its established  
9 procedures. Most significantly, WSU documents and testimony offer conflicting  
10 accounts of how its review process determined whether an employee's request for  
11 a religious exemption was based on a sincerely held religious belief.  
12

13       First, WSU internal documents and talking points consistently state that  
14 this determination was made by its blind review committee before the employee's  
15 department was contacted regarding possible accommodations:  
16

- 17       • Internal procedures drafted by HRS state that the review committee  
18       “*determines* if the employee holds sincerely held religious beliefs,  
19       practice, or observance” and the employee's department is contacted  
20       only after a “sincerely held religious belief is *confirmed*.” SADMf ¶  
21       110.  
22

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- 1 • On October 8, Ms. Gehring affirms as “correct” a draft statement to the  
2 Governor’s office stating that the review committee makes the “*final*  
3 *decision* as to whether to grant a religious exemption.” (emphasis  
4 added). *Id.* at ¶ 107.
- 5 • A WSU Insider article published the same day, which HHS reviewed  
6 before publication, says that the employee’s department is notified by  
7 email only “if an exemption is *approved*.” (emphasis added). *Id.* at ¶  
8 108.
- 9 • October 15 WSU talking points state, “If an employee exemption is  
10 *approved*, the application goes through a second process...” *Id.* at ¶  
11 103. (emphasis added).
- 12 • On October 19, WSU’s current Chief Human Resource Officer,  
13 Theresa Elliot-Cheslek, wrote, “Once a determination was made, the  
14 process moved to HRS for notification. If the [Religious Exemption]  
15 was *approved*, the next step was the accommodation process.” *Id.* at ¶  
16 104. (emphasis added).

17 These documents describe the way that WSU actually evaluated employee  
18 requests for religious exemptions: in 473 of 475 applications (99.6%), the review  
19 committee made the final determination as to whether an employee had a

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1 sincerely held religious objection to the vaccine mandate. *Id.* at ¶ 112. <sup>[1]</sup> When  
2 WSU review committee member Bonnie Dennler was asked if there was “any  
3 other employee at WSU whose application for religious exemption was treated  
4 the way Nick Rolovich's was treated,” she answered: “I do not believe so.” *Id.* at  
5 ¶ 113.

7 Very recently, WSU has claimed that its blind review committee—which  
8 its talking points said made its review process “**fair and equitable** for all  
9 requestors,” *id.* at ¶ 104, —*never* made the final call on whether an exemption  
10 request was based on a sincerely held religious belief. “Ultimately, department as  
11 the appointing authority had the authority and responsibility to decide whether the  
12 employee had a sincerely held belief in conflict with COVID-19 vaccination...”  
13 *Id.*

15 WSU claims that the Governor’s Proclamation and EEOC guidance  
16 *precluded* the University from entrusting the sincerity determination to a blind  
17 review process. *Id.* It has made no effort to reconcile this claim with its  
18 statements elsewhere lauding the significance of its blind review process.

20 These differing accounts create issues of material fact as to what WSU’s  
21 process for evaluating requests for religious exemptions actually was and whether  
22 WSU knowingly departed from those procedures in denying that Rolovich’s

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1 request was based on a sincerely held religious belief. It will be up to a jury to  
2 decide whether WSU rejected Rolovich's exemption request through the process  
3 it described as "fair and equitable" and whether WSU made good on President  
4 Schulz's promise: "Regardless of (how much money) the person makes, what  
5 position they have, we have to treat people the same." SADMf ¶ 125. These  
6 issues of material fact preclude summary judgment for WSU.  
7

8 Just as there are issues of material fact as to whether WSU processed  
9 Rolovich's religious exemption request the same way it treated hundreds of  
10 others, there are issues of fact as to whether WSU prejudged Rolovich's  
11 exemption request, denying him his right to a full and fair consideration of his  
12 religious objection.  
13

- 14 • Discovery has uncovered behind-the-scenes communications among  
15 WSU's top officials that provide ample evidence from which the jury  
16 could find that WSU decided in August 2021—long before it  
17 decided on criteria for reviewing religious exemption requests, and  
18 long before it saw Rolovich's application stating his religious  
19 objections—that it was going to deny his request. A reasonable jury  
20 could find that WSU developed this "Rolo strategy" so it could  
21 create a case for a "just cause" termination and avoid paying  
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1 Rolovich liquidated damages. Such an inference would also support  
2 a jury finding that, in exercising its discretion in terminating  
3 Rolovich's employment, WSU breached its implied duty of good  
4 faith and fair dealing. *Silvey v. Numerica Credit Union*, 519 P.3d  
5 920, 931 (2022). On August 17, 2021, three days before the  
6 Governor's Proclamation was made applicable to state employees in  
7 higher education (but after WSU officials were aware that such a  
8 change was coming), a WSU Board of Regents member texted  
9 President Kirk Schulz asking, "What is our game plan in dealing  
10 with Rolovich?" SADMf ¶ 95.

- 13 • Within an hour and a half, President Schulz texted Athletics  
14 Director Patrick Chun, "We have a plan - so let me get some  
15 details and I will give you a call." *Id.* at ¶ 96.
- 17 • An hour later, President Schulz texted the Chair of the Board of  
18 Regents, Marty Dickinson, "Let me know how schedule looks for  
19 next few days - we have a Rolo strategy." *Id.*
- 21 • Two days later, immediately upon learning that Rolovich  
22 intended to seek a religious exemption, President Schulz texted  
23 the Chair again:

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1 Not to be too depressing this evening – but it appears that Nick is  
 2 going to claim a religious exemption to the vaccine mandate. I asked  
 3 Phils to engage a Seattle firm to assist us – and I intend to be pretty  
 4 public expressing my disappointment with his decision. Right now  
 we are so angry (Pat and myself) that we cannot see straight.

5 *Id.* at ¶ 97.

- 6 • Chair Dickinson responded to President Schulz: “So disappointed  
 7 and pissed!! Right there with you Kirk! And can you pls tell me  
 8 his devoted religion?” President Schulz responded, “I have no  
 9 \$&\$@@@ idea. Probably searching on the internet as we speak.”

10 *Id.*

- 11 • The next morning, Chair Dickinson texted President Schulz that  
 12 they needed to “recognized all the nuances” of the situation,  
 13 including “From firing and paying \$\$\$ while Seattle beats us up  
 14 on deficit yet want the coach gone!!!! . . . time to take the reigns  
 15 and in my opinion no longer protect Nick who has tarnished  
 16 WSU Brand.” *Id.* at ¶ 98.
- 17 • Later that day, President Schulz sent the Board of Regents an  
 18 update expressing his “disappointment” in Rolovich’s decision to  
 19 file for a religious exemption. Schulz stated that while he has  
 20 “the greatest respect” for other WSU employees “whose religious  
 21  
 22  
 23

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1 convictions prevent them from taking the vaccine,” he was  
2 “deeply disappointed that WSU’s football coach has opted to use  
3 the exemption process.” *Id.* at ¶ 99.

- 4 • Eleven days before Rolovich had even submitted his exemption  
5 request, Chun texted a friend, “Our head coach has put himself in  
6 a bad situation by not getting Vax. It’s going to be a great lesson  
7 for current or future coaches about decisions you can or cannot  
8 make as a head coach.” *Id.* at ¶ 100.

9 Viewed in the light most favorable to Rolovich, this evidence could lead a  
10 reasonable jury to conclude that WSU was never going to follow its own process or the  
11 process mandated by Title VII. Even viewed in the most innocent light for WSU, it  
12 indicates that before WSU officials knew anything about the bases of Rolovich’s  
13 religious objection (and, thus, of its viability or authenticity), they were “angry” and  
14 “pissed.” WSU leadership set in motion a “Rolo strategy” and “plan” to that would be  
15 “a great lesson for current or future coaches about decisions you can or cannot make as  
16 a head coach.” A reasonable jury could conclude that this “Rolo strategy” involved  
17 denying Rolovich’s request for a religious exemption and thus avoid his liquidated  
18 damages. These issues of material fact preclude summary judgment on Rolovich’s  
19 breach of contract claim.

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**C. Disputed issues of material fact preclude summary judgment on Rolovich's claim that WSU willfully withheld wages.**

Similarly, factual disputes preclude summary judgment for WSU on Rolovich's withholding of wages claim. *See* ECF No. 93 at 38-40. It is the employer's burden to show that it had a "bona fide" belief that the employee was not due the wages in question. *Hvidtfeldt v. Sitrion Sys. Americas, Inc.*, 190 Wash. App. 1031 (2015) (citing *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 834, 287 P.3d 516 (2012)). "The issue of whether an employer acts willfully is generally a question of fact. But the issue may be resolved on summary judgment when no material facts are in dispute." *Ruhl v. ProjectCorps, LLC*, 192 Wash. App. 1041 (2016) (citing *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998)). If "reasonable minds could reach different conclusions from the evidence presented," summary judgment on Rolovich's wrongful withholding of wages claim is "improper." *Zimmerman v. W8LESS Prod., LLC*, 160 Wash. App. 678, 695, 248 P.3d 601, 609 (2011), *disapproved of on other grounds by Crossroads Mgmt., LLC v. Ridgway*, 540 P.3d 82 (Wash. 2023).

Here, summary judgment for WSU is improper because there are disputed material facts as to whether WSU's decision to terminate Rolovich was made in good faith. First, as noted above in Section B.3, WSU President Schulz understood that he had to treat people the same and his public statements was careful to pledge that he would do so: "Regardless of [how much money] the

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1 person makes, what position they have, we have to treat people the same.”

2 SADMf ¶ 125. He noted that the relevant question was whether he was “willing

3 to terminate a faculty member [or] a staff member for the same decision[.]” *Id.*

4 Yet behind closed doors, he expressed an intent to treat Rolovich’s application

5 different from everyone else’s. SADMf ¶¶ 104 & 176. Schulz knew this was a

6 risky strategy, privately texting, “While I know I have to be careful—I would like

7 to include a quote expressing my disappointment in this decision.” SADMf ¶

8 176. Yet he did so regardless.

9  
10 Second, although WSU’s above-described internal policies entrusted

11 HRS’s review committee with making judgments on sincerity, and though Chun’s

12 October 13 memo to HRS requested “re-evaluation of the claimed sincerely held

13 religious belief,” WSU now claims that “ultimately,” the “appointing

14 authority”—here, the Athletics Department—had the authority and responsibility

15 to decide whether the employee had a sincerely held belief in conflict with

16 COVID-19 vaccination.” *Id.* at ¶ 115.

17 Third, the blind review committee made the final sincerity determination in

18 99.6% of requests for religious exemptions, but WSU recently confirmed that it

19 was Athletics itself that made the final sincerity determination on Rolovich’s

20 application. *Id.* at 123.

21 In short, there is palpable dissonance between WSU’s public commitment

22 to fairness and impartiality and its internal talk about a “Rolo strategy,” between

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1 its public statements and its 30(b)(6) testimony on its review procedures, and  
2 between the way it decided over 450 exemption requests and the way it handled  
3 Rolovich's. These tensions create material issues of fact as to whether WSU  
4 really believed that it was acting in good faith when it allowed Chun to overturn  
5 the review committee's sincerity determination, when WSU decided not to  
6 accommodate Rolovich's religious convictions, and when it then concluded that it  
7 had "just cause" to terminate him and avoid paying out his liquidated damages  
8 provision.

9 For all these reasons, Rolovich's wrongful withholding claim should  
10 proceed to the jury.

### 11 CONCLUSION

12 For the reasons provided above, Plaintiff Nicholas Rolovich respectfully  
13 requests that the Court

- 14 a) deny WSU's request for summary judgment on the Title VII, WLAD,  
15 breach of contract, and wage-withholding claims;  
16 b) grant summary judgment on the first element of Rolovich's *prima facie*  
17 case for the Title VII failure to accommodate claim, that Rolovich has a  
18 religious belief which conflicted with WSU's vaccine mandate;  
19 c) grant summary judgment on the second element of Rolovich's *prima*  
20 *facie* case for his Title VII failure to accommodate claim, that Rolovich  
21 informed WSU of his religious belief and conflict; and  
22

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1 d) grant summary judgment on the third element of Rolovich's *prima facie*  
2 case for his Title VII failure to accommodate claim, that Rolovich was  
3 terminated by WSU for Rolovich's inability to comply with the vaccine  
4 mandate, a job requirement.

5  
6 I certify that this memorandum contains 9401 words, in compliance with  
7 the Court's Order of September 18, 2024, ECF No. 86.

8 DATED this 4<sup>th</sup> day of November, 2024.

9  
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PLAINTIFF'S COMBINED RESP. TO  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of November, 2024, I electronically filed the forgoing PLAINTIFF'S COMBINED RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. I hereby certify that none of the represented parties are non-CM/ECF participants.

By: /s/ E. Job Seese  
E. Job Seese

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